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July 7, 2003

Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth St., S.W.
Washington, D.C. 20554

**Re: Western Wireless Corporation Petition for Waiver of
Section 54.314(d) of the Commission's Rules;
CC Docket No. 96-45**

Dear Ms. Dortch:

This letter on behalf of Western Wireless Corp. ("Western Wireless") responds to a question from the Wireline Competition Bureau staff regarding whether Western Wireless has standing to request a waiver of Section 54.314(d) of the rules, which concerns a required filing by the South Dakota Public Utilities Commission. Western Wireless appreciates this opportunity to address this question.

Western Wireless has standing to file this waiver request, because it is the party that is directly affected by operation of the rule for which the waiver is sought. The federal courts developed their "standing" jurisprudence as a means to enforce the Article III requirement that an actual "case or controversy" be present before the federal courts may issue a ruling. Although it is clear that neither the constitutional "standing" requirement nor the Article III "case and controversy" requirement applies to proceedings before the FCC, 1/ the federal case law is informative:

1/ See, e.g., *California Association of the Physically Handicapped, Inc. v. FCC*, 778 F.2d 823, 826 n.8 (D.C. Cir. 1985) ("The Article III restrictions under which this court operates do not, of course, apply to the FCC. The Commission may choose to allow persons without

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In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues. . . . As an aspect of justiciability, the standing question is whether the plaintiff has ‘alleged such a personal stake in the outcome of the controversy’ as to warrant his invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf. . . . [Th]e plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties. 2/

Western Wireless clearly has standing under this standard. If the requested waiver is not granted, then Western Wireless will be deprived of substantial sums of universal service support revenues to which it otherwise would be entitled. Western Wireless therefore has a concrete, personal stake in the outcome of the current proceeding. Moreover, Western Wireless is seeking relief with respect to its own legal rights and interests, and not those of third parties. 3/

Article III ‘standing’ to participate in FCC proceedings, as it did in this case.”); *Gardner v. FCC*, 530 F.2d 1086, 1090-91 (D.C. Cir. 1976) (“agencies are free to hear actions brought by parties who might be without party standing if the same issues happened to be before a federal court”); *Channel 32 Hispanic Broadcasters, Ltd. Pueblo, Colorado, For a Construction Permit for a New Television Station at Pueblo, Colorado*, Order, 15 FCC Rcd 22649, ¶ 7 (2000) (“a licensing proceeding before the Commission is not an Article III proceeding to which either the ‘case or controversy’ or prudential Article III standing requirements apply”); *Connecticut Cable Television Association, Inc.*, Memorandum Opinion and Order, 4 FCC Rcd 476, ¶ 6 (1989) (“A federal administrative agency is not restricted by Article III constitutional considerations of ‘case or controversy’, but is ‘free to hear action brought by parties who might be without party standing if the same issues happen to be before a federal court.’”)

2/ *Warth v. Seldin*, 422 U.S. 490, 498-99 (1975) (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)); *accord*, *Barlow v. Collins*, 397 U.S. 159 (1970) (parties have standing if they are within the “zone of interests protected by the Act”).

3/ Because Western Wireless, rather than the state commission, is the most directly affected party, it is reasonable that the carrier, not the state commission, is the appropriate party to file such a waiver petition.

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Indeed, in essence Western Wireless is seeking a waiver not of the rule providing that state commissions must file universal service certifications by specified dates, but of the rule providing that eligible telecommunications carriers cannot receive support unless the state commission makes such a timely filing. The relief Western Wireless seeks is not a waiver of the filing deadline, but entitlement to receive universal service support funds. Section 54.314(a) requires state commissions to make filings (“states that desire . . . carriers to receive support . . . must file an annual certification . . .”), but Section 54.314(d) governs carriers’ eligibility to receive support: “Carriers for which certifications are filed on or before October 1 shall receive support . . . in the first, second, third, and fourth quarters of the succeeding year.” ^{4/} Western Wireless is the party that has been denied substantial amounts of support by operation of the Section 54.314(d) requirement, and it is that requirement for which the waiver is sought.

Finally, despite the fact that, under any reasonable reading of the facts presented, Western Wireless does have standing to file the instant waiver petition, it should be noted that standing is not a prerequisite to filing a waiver petition. Indeed, there is no need for a petition to be filed at all before the Commission may grant a waiver: “[a]ny provision of the rules may be waived by the Commission on its own motion or on petition if good cause therefor is shown.” ^{5/} Although other statutory provisions and Commission rules explicitly narrow the classes of persons who are eligible to make specified filings (for example, the petitions for reconsideration, applications for review, petitions to deny applications for radio

^{4/} 47 C.F.R. §§ 54.314(a), (d)(1).

^{5/} 47 C.F.R. § 1.3.

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licenses, and complaints for enforcement of certain cable television rules), 6/ the waiver rule contains no similar restriction. 7/

6/ See, e.g., 47 U.S.C. § 405 (petitions for reconsideration); 47 C.F.R. § 1.106(b)(1) (same); 47 C.F.R. § 1.115(a) (applications for review); 47 U.S.C. § 309(d)(1) (petitions to deny applications for radio licenses); 47 C.F.R. § 73.3584(a) (same); 47 U.S.C. § 534(d)(1) (Section 614(d)(1) of the Communications Act) (local television stations may file complaints for cable operators' alleged violation of "must carry" obligations); *Wiegand v. Post Newsweek Pacifica Cable, Inc.*, 16 FCC Rcd 16099, 16101, ¶ 5 (2001) (subscribers lack standing to file such "must carry" complaints).

7/ The Commission has held that parties may lack standing to *object* to waivers properly sought by others if the objecting parties "fail[] to show a sufficient connection to the challenged action to establish that [they] would be injured by that action." See, e.g., *Disposition of Down Payment and Pending Applications by Certain Winning Bidders in Auction No. 35*, 17 FCC Rcd 23354, 23367-68, ¶ 19 (2002); *Requests for Refunds of Down Payments Made In Auction No. 35*, 17 FCC Rcd 6283, 6284 n.5 (2002) ("whether a party has standing to protest a Commission action 'must be based on injury caused by that action – that petitioner must show that it is adversely affected or aggrieved by some change flowing from the Commission action protested.' . . . In other words, the party must be 'able to establish that a grant of the instant application would result in, or be reasonably likely to result in, some injury of a direct, tangible or substantial nature.' ") (citations omitted). Of course, in the instant proceeding, Western Wireless has shown that it would suffer an "injury of a direct, tangible [and] substantial nature" and that it is "adversely affected or aggrieved" by the denial of universal service funding that would result unless the waiver is granted.

To be sure, in one case the Auctions and Industry Analysis Division of the Wireless Telecommunications Bureau, acting on delegated authority, observed "as a threshold matter, . . . that [the petitioning party] lacks standing to request a waiver" of rules that primarily affected another entity; but the Division proceeded with a lengthy discussion of the merits of the waiver request and "denied" the waiver petition on its merits, rather than "dismissing" it for lack of standing. *D&E Communications, Inc.*, 15 FCC Rcd 61, 65, 69, ¶¶ 9, 16 (Auctions & Indus. Analysis Div., Wireless Tel. Bur. 1999). In another case a different division of the Wireless Telecommunications Bureau dismissed a petition for waiver of build-out deadlines on the grounds that the petitioners, creditors of a formerly bankrupt licensee, lacked standing because they "no longer hold any interest in any of the subject licenses." *Hughes Network Systems and Wilmington Trust Co. Requests for Waiver*, 15 FCC Rcd 15387, 15389, ¶ 7 (Commercial Wireless Div., WTB 2000). But in the same order the Division proceeded to reject

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Thus, on at least one occasion, the Commission has granted a petition for waiver of a rule filed by a party to whom the rule did not directly apply. The cable/broadcast cross-ownership rule, 47 C.F.R. § 76.501(a), directly applies to the cable operator. Nonetheless, the Cable Services Bureau, on delegated authority, granted a waiver sought by a member of the board of directors of a company with a non-controlling minority interest in a cable operator, to enable him to serve concurrently as a member of the board of directors of a non-commercial television station. ^{8/} In that case, the director's conduct was affected by the rule even though the rule technically applied to another party. Similarly here, even to the extent the Commission believes that the rule at issue technically governs the conduct of the state commission, it can and should nonetheless grant the requested waiver to Western Wireless, which is directly affected by the operation of the rule.

In sum, for the reasons stated above, the Commission has authority to grant the requested waiver. As discussed in the waiver petition and in Western Wireless' reply comments, the Wireline Competition Bureau has already granted numerous waivers in circumstances virtually indistinguishable from those presented here. ^{9/} The Bureau should proceed to grant the waiver expeditiously.

on the merits a related request by the licensee. *Id.*; accord, *220 MHz Non-Nationwide Licenses*, 15 FCC Rcd 4569, 4572-73, ¶¶ 8-10 (Commercial Wireless Div., Wireless Tel. Bur. 2000). However, as discussed above, the current case can be distinguished. Western Wireless continues to have a very real and concrete interest in the outcome of the current waiver proceeding, which involves rules that primarily affect Western Wireless itself.

^{8/} *Michael I. Sovern, Petition for Special Relief Requesting Waiver of 47 C.F.R. § 76.501(a)*, Memorandum Opinion and Order, DA 00-2471, 2000 WL 1639002 (Cable Serv. Bur., rel. Nov. 2, 2000).

^{9/} *Western Wireless Corp. Petition for Waiver of Section 54.314(d) of the Commission's Rules*, CC Docket No. 96-45, at 7-8 & notes 13, 17 (filed Mar. 14, 2003); *Western Wireless Reply Comments on its Petition for Waiver of Section 54.314(d) of the Commission's Rules*, CC Docket No. 96-45, at 2-3 & notes 3-6 (filed May 19, 2003).

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If you have any further questions, please do not hesitate to contact me

Respectfully submitted,

A handwritten signature in black ink, reading "David L. Sieradzki". The signature is written in a cursive, flowing style.

David L. Sieradzki
Counsel for Western Wireless

cc: William Maher, Chief, Wireline Telecommunications Bureau
Carol Matthey, Deputy Bureau Chief, WTB
Eric Einhorn, Chief, Telecommunications Access Policy Division, WTB
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